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REPORT OF THE COMMISSION ON TRANSNATIONAL CORPORATIONS ON ITS SEVENTEENTH SESSION

Addendum

Efforts by the United Nations to address the issue of corrupt practices

Report of the Secretary-General

SUMMARY

The present report has been prepared in response to resolution 1991/1, adopted by the Commission on Transnational Corporations at its seventeenth session, in which the Commission requested the Secretary-General to review the status of the efforts by the United Nations to address the issue of corrupt practices in international business transactions. The report considers first the problem of illicit payments in general, and its potential political, economic, social, legal and moral challenges for policy makers. It notes that, although national laws exist in most countries with respect to corrupt practices, they are not always effective against illicit payments in international commercial transactions. Action at the international level is necessary to deal effectively with this problem. Thus far, most efforts at the United Nations have concentrated on the drafting of an international agreement. An overview of the draft agreement shows a substantial degree of consensus on this issue. To facilitate the understanding of the content and meaning of the text of the draft agreement (attached as annex I) the report discusses a number of methods and issues that were considered in the process of the preparation of the instrument. The history of the elaboration of the draft international agreement is also outlined (annex II), up to 1979 when the Committee in charge of the preparation of the draft agreement submitted the results of its work to the General Assembly, which has so far taken no action to convene a conference to complete the instrument.

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INTRODUCTION

1. At its seventeenth session, the Commission on Transnational Corporations, in its resolution 1991/1 on corrupt practices in international business transactions, requested the Secretary-General to prepare a report on the status of United Nations efforts to address the issue of corrupt practices in international business transactions and to circulate it to member States for the second regular session of 1991 of the Economic and Social Council in time for the ongoing consultations towards a final agreement on the draft code of conduct on transnational corporations, called for by the General Assembly in resolution 45/186, as an important contribution to that process. 1/ The Commission stressed its conviction that a stable and predictable environment for international business transactions is essential for the mobilization of investment, finance, technology, skills and other important resources across national borders to promote economic and social development worldwide, especially that of countries seeking to revitalize or develop their economies. It recognized that the prevention and avoidance of corrupt practices could be an important element in an improved international business environment and could also enhance fairness and competitiveness in transnational business transactions for the benefit of the general public. In making its request, the Commission called attention to the substantial progress that had been made by the Committee on an International Agreement on Illicit Payments as of 1979, and considered that further activities were necessary for the prevention and avoidance of corrupt practices that would help strengthen international cooperation in that respect. The Commission also recalled General Assembly resolution 45/186 concerning the draft code of conduct on transnational corporations. The present report has been prepared in response to the Commission's request.

2. This report provides, in section I, some general reflections on the problem of corrupt practices and on the need to address this problem at the international level. Section II contains an overview of the draft international agreement on illicit payments, prepared by the Committee on an International Agreement on Illicit Payments and submitted to the Economic and Social Council in 1979. Section III.A discusses briefly the various methods and approaches that have been considered for dealing with the issue of corrupt practices at the international level. In section III.B, a number of major issues and concepts raised in the preparation of the international agreement are also examined to facilitate the understanding of the current draft. In all these aspects the present report draws upon earlier reports prepared by the United Nations Centre on Transnational Corporations on the question of corrupt practices in international business transactions. 2/ The text of the draft international agreement is annexed to this report (annex I). Lastly, the history of United Nations efforts to address the problem of corrupt practices is summarized in annex II.

I. THE PROBLEM OF ILLICIT PAYMENTS IN INTERNATIONAL BUSINESS TRANSACTIONS

3. There is general agreement that a stable and predictable environment for international business transactions is essential for the mobilization of the

investment resources and economic activity needed to improve economic and social conditions in many parts of the world. One of the problems potentially most damaging for the stability of State/foreign private business relations is the use of bribery and other corrupt practices in commercial transactions across national borders. Such practices can divert resources for economic development, distort competition and hamper the beneficial effects of international investment and trade flows. Because of the pervasive negative implications of corrupt practices for international business relations, the prevention and avoidance of such practices would substantially contribute to an improved international business climate.

4. The problem of corrupt practices raised considerable debate during the 1970s, particularly when, as a result of some investigations, it became obvious that those practices were a widespread phenomenon. 3/ The investigations also served to demonstrate the political, economic, social, legal and moral challenges the problem of corrupt practices poses for policy makers. The effects of corrupt practices can be deleterious when such practices take place within a national context, but they are exacerbated and their ramifications even more serious when these practices occur in the context of international commercial transactions. The political and economic climate of the early 1970s, characterized as it was by political tension and antagonism between foreign private firms and developing countries, did not provide a productive context for international agreement on common approaches to the problem of corrupt practices in international business transactions. Since then, the climate has changed significantly. Developing countries have come to appreciate the positive contributions that transnational business can make to their economic development, and debates in international forums have lost the confrontational tone that predominated in that decade. At the same time, the increasing transnationalization of economic activity has intensified the need for international cooperation to facilitate economic exchanges worldwide. In the present economic context, the establishment of mutually agreed, balanced international standards and instruments, which emphasize preventive measures and mechanisms to avoid corrupt practices in international commercial transactions while providing the necessary guarantees for protection against arbitrary action, would improve the level of fairness and trust in international business operations and, thus, enhance the chances of mutually beneficial exchanges between States and foreign private firms.

5. In particular, preventive measures are needed to avoid corrupt practices from undermining the process of development by inducing countries to make inappropriate expenditures and to waste needed resources. Whenever a business transaction results from corrupt practices, resources and wealth have been misallocated. These distortions could be avoided if economic transactions were conducted in an atmosphere free from impropriety.

6. Corrupt practices can also have an adverse impact on international flows of investment and trade. Illicit payments by an individual or corporation could reflect negatively on the corporation and its home country, as well as on the country receiving the payment. In those circumstances, relations between the States and private actors involved could be strained and the chances of future business deals among them limited.

7. Although national laws exist in most countries with respect to corrupt practices, they are not always effective against illicit payments in international commercial transactions because of the transnational element in the transaction and its international implications (see E/AC.64/3, sect. II.A). The impediments to effective national action are many and varied. Effective implementation at the national level may be impeded by conflicts of jurisdiction, the inadequacy of information available in any one State and conflicting governmental policies towards enterprises and their activities.

8. Illicit payments in international commercial transactions involve activities in several States, including the home country of the person or corporation making the payment, the country in which the decision-making process is intended to be influenced and possibly third countries through which the payments may pass to avoid discovery. Effective control of the problem would involve concurrent action in home, third and host or purchaser countries.

9. It is possible that in some States existing laws and administrative and legal structures are not comprehensive enough to reach the various types of corrupt practices. The development of such laws by means of an international instrument that can be used as a model text could help bring about the required harmonization.

10. Because illicit payments are sometimes used as competitive tools, some countries may perceive that unilateral action to change national law to prohibit such payments by their nationals would place their firms at a serious competitive disadvantage internationally in the absence of similar laws affecting their competitors from other countries. International action to harmonize domestic law will therefore be required with respect to prohibitions. Thus, although the most important remedies necessarily comprise national action, international agreement on simultaneous national action is also essential.

11. Action at the international level would seem especially necessary to achieve a common understanding of the concepts and terms used to define certain activities and to establish uniform disclosure procedures. This would not only help achieve uniformity in the reporting procedures, which corporations may be required to follow, but would also help establish cooperative procedures for the exchange of information.

II. DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS: OVERVIEW

12. The problem of corrupt practices in international business transactions was first addressed at the international level by the General Assembly in its resolution 3514 (XXX) of 15 December 1975. In that resolution, the Assembly condemned all corrupt practices and called on Governments to take all necessary measures, including legislative measures, to prevent such practices. In 1976, the Economic and Social Council created an Ad Hoc Intergovernmental Working Group to consider the problem of corrupt practices

and to elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments. In July 1978, the Council established a preparatory committee to complete the draft agreement. The Committee on an International Agreement on Illicit Payments worked on the draft agreement during 1979, and in May 1979 an almost complete text of the draft international agreement on illicit payments was transmitted through the Council to the General Assembly, which has so far taken no action to convene a conference to conclude and formalize the instrument. (See annex II for a detailed history of United Nations efforts to address the question of corrupt practices.)

13. The draft international agreement on illicit payments prepared by the Committee consists of a preamble and 11 articles dealing with the following main aspects: definitions, jurisdiction, action at the national level and action at the international level. There is some language in brackets indicating lack of consensus in the Committee and also problems arising from differences in national legal systems. (The full text of the draft agreement is contained in annex I to the present report.)

A. Preamble

14. The drafting of the preamble was left for the conference of plenipotentiaries.

B. Definitions

15. The definition of the acts to be covered under the agreement is contained in article 1, which is free of brackets. Those acts are to be made punishable by appropriate criminal penalties under the national laws of the States parties to the agreement. In addition, article 1, paragraph 2, includes a provision that would require States that do not recognize criminal responsibility of juridical persons to take appropriate measures designed to achieve effects comparable to the criminalization of acts by juridical persons. Article 2 defines the terms "public official", "international commercial transaction" and "intermediary". All the definitions are discussed in detail in section III of this report.

C. Jurisdiction

16. The criteria for allocating jurisdiction over illicit payments in international business transactions where more than two States are involved are stipulated in article 4 of the draft agreement, also free of brackets, as follows:

(a) It establishes the jurisdiction of a State over acts committed within its territory (territorial jurisdiction);

(b) It recognizes the jurisdiction of a State over acts committed by a public official of that State (personal jurisdiction);

(c) It establishes jurisdiction on the basis of the nationality of the person or persons involved in an offence in connection with the offering or making of the illicit payment (personal jurisdiction), but only when another element of the offence is connected with that State, thus substantially limiting the jurisdiction based only on grounds of the nationality of the persons involved in the illicit payment.

In addition, the draft agreement includes a provision in brackets whereby a State would have jurisdiction if the illicit acts have effects within its jurisdiction. This provision would seem to expand the notion of jurisdiction beyond the criteria normally found in the rules of private international law of most States.

17. Article 5 establishes the compulsory jurisdiction of the State in whose territory the alleged offender is found, if that State has jurisdiction in accordance with the above-mentioned criteria, unless that State extradites the alleged offender. It further provides that proceedings should be in accordance with the national laws of that State.

D. Action at the national level

18. In addition to the criminalization of acts coming under the definition of illicit payments prescribed in article 1, the instrument prescribes two important preventive measures at the national level:

(a) Information disclosure. Article 6, which is free of brackets, imposes an obligation on States parties to ensure that enterprises or other juridical persons established under their territory maintain accurate records of payments they made in connection with an international commercial transaction. In addition, article 6 mentions a number of specific items to be disclosed. Failure to maintain such records is to be penalized by the relevant State, though the draft agreement does not give any clues about the type of penalties that might be imposed.

(b) Effects under civil law. Article 8, in brackets, provides for the cancellation of contracts and agreements acquired through illicit payments. Thus, it permits the innocent party to institute civil proceedings to declare the transaction null and void and/or to obtain damages, if it is established that an illicit act falling under the draft agreement has been instrumental in obtaining its consent for an international commercial transaction.

19. Further, the draft agreement contains a section, also in brackets, on payments of royalties or taxes to illegal minority regimes. Under draft article 7, such payments should be prohibited by the States parties. In the light of recent developments in international relations, the necessity of such a clause could be reconsidered.

E. Intergovernmental action

20. Action at the intergovernmental level includes provisions on exchange of information, mutual assistance and extradition. As these are more straightforward issues, fewer brackets appear. Article 9 requires States to provide information on the implementation of the agreement regularly, including legislative and administrative measures as well as general information on judicial proceedings and other measures, and on individual cases that are final, unless that information is confidential under the laws of the State providing the information.

21. States are also asked to provide mutual judicial assistance and to cooperate in the investigation and prosecution of corrupt practices by competent law enforcement authorities. Article 10 specifies the modalities for such assistance and also provides certain guarantees for maintaining the confidentiality of the information as well as protection against the misuse of such information. Provisions are also included (art. 11) to incorporate illicit payments under the agreement as extraditable offences in any extradition treaty existing or to be concluded between the States parties to the agreement.

F. Final provisions

22. In addition to the foregoing provisions, a number of additional items would have to be included before the draft agreement can be considered complete. Those items relate to the questions of (a) settlement of disputes; (b) entry into force; (c) depository; (d) signature, ratification, acceptance, approval, accession; (e) reservations; (f) revision or amendment; (g) review conference. In all those aspects, the Committee considered a number of proposals but decided to submit them for consideration by the conference of plenipotentiaries. 4/

III. MAJOR METHODS AND ISSUES CONSIDERED IN THE ELABORATION OF AN INTERNATIONAL INSTRUMENT ON THE PROBLEM OF CORRUPT PRACTICES IN INTERNATIONAL BUSINESS TRANSACTIONS

23. The draft international agreement described in the preceding section emerged as the result of a number of choices made by the intergovernmental bodies entrusted with the task of elaborating an international instrument on corrupt practices. This section discusses various methods and issues that were considered at the time in connection with the preparation of the international instrument (see E/AC.64/7, sect. VI.A). The analysis of the main questions raised in the elaboration of the instrument is intended to facilitate the understanding of the context, scope and meaning of the draft agreement and its provisions.

A. Methods considered for dealing with the problem of corrupt practices

24. Among the various approaches that were considered for dealing with the problem of corrupt practices in international commercial transactions at the international level were the following: (a) international agreements; (b) codes of conduct; (c) model laws; (d) unilateral national action;

(e) procurement codes; (f) certification; (g) voluntary business codes. These methods are not mutually exclusive. Thus, while the conclusion of an international agreement was the method chosen by the Economic and Social Council, one or more of these additional approaches can be used in conjunction with, or in addition to, the others (see E/AC.64/7, sect. VI. B).

1. Conclusion of an international agreement

25. As indicated above, most United Nations efforts in connection with the problem of corrupt practices have concentrated on the elaboration of an international convention. The merit of an international convention is that it creates "hard" obligations under international law for the States parties that are directly enforceable by national and international courts of law.

2. Codes of conduct

26. The problem of corrupt practices has also been discussed in the context of the preparation of codes of conduct on transnational corporations. The issue has been dealt with briefly in the draft United Nations code of conduct on transnational corporations and in the OECD Guidelines for Multinational Enterprises. 5/ The code dedicates one section to this issue which includes a general provision and a subparagraph on disclosure and reporting requirements (see E/1990/94, annex, para. 20 (a) and (b)). While these instruments are not intended to be legally binding, their significance and impact in the long term in preventing illicit payments could be quite important.

3. Model laws

27. An international instrument can also be used as a model law. If enacted by many countries, a model law would provide certainty about the kinds of behaviour that are proscribed so that different standards in different countries would not have to be coped with. It would make possible a degree of harmonization of the national laws on the subject and thus greatly facilitate cooperation across different jurisdictions among national organs involved in the application of the laws.

4. Unilateral national action

28. The problem of corrupt practices has also been approached by way of General Assembly resolution 3514 (XXX), in which the Assembly called upon States to take effective measures, including legislation, in addressing the problem of corrupt practices. In addition, the Assembly requested Governments, among other things, to report regularly to the Secretary-General on the measures adopted to give effect to the resolution.

5. Procurement codes

29. An additional complementary method for addressing the problem of corrupt practices consists of the establishment of procurement codes to govern international procurement contracts. In this respect, the procurement codes elaborated by international financial institutions such as the World Bank

could serve as models in the preparation of similar codes for private financial institutions. Strict adherence to transparency and open competitive tendering in procurement contracts could greatly reduce the risk of corruption and illicit payments in such transactions.

6. Certification

30. Also in relation to action at the national level, another significant preventive measure is the requirement by States of a certification by corporations and intermediaries that no improper payments have been made as a condition for granting the necessary government approvals for a transaction.

7. Voluntary business codes

31. Some corporations have adopted internal guidelines of behaviour for their employees. These instruments often include condemnations of bribery and other practices and urge corporate employees to abstain from committing such acts. Thus, one form of dealing with this issue consists of recommending the adoption and use of such internal guidelines by corporations engaged in international commercial transactions. A useful model for such corporate rules is the International Chamber of Commerce (ICC) Rules of Conduct on Extortion and Bribery in International Transactions, prepared in 1978, which ICC recommended for adoption to its members.

B. Main issues considered in the preparation of the international agreement

1. Preamble

32. In examining the main issues considered in the elaboration of the draft international agreement on illicit payments it is useful to begin with a survey of previous United Nations resolutions relevant to the issue of corrupt practices, as well as the purposes and orientations of those resolutions (see annex II). In addition, it would help to review the main problems posed by corrupt practices in the context of current international economic relations, and to identify the objectives to be achieved through the formulation, adoption and implementation of the international agreement. For example, corrupt practices in international commercial transactions could adversely effect, among other things:

(a) International investment and trade flows;

(b) The process of economic development;

(c) International competitiveness of private firms;

(d) The reliability and fairness of transnational commercial operations;

(e) The stability of the international commercial environment.

33. With respect to the purposes of, and reasons for, international action on illicit payments, the following aspects have been recognized:

(a) The need to strengthen national measures against corrupt practices and to develop further methods for their prevention and punishment;

(b) The need to harmonize national action and to achieve uniform understanding of the basic concepts involved;

(c) The need for international cooperation to assist in the implementation of national laws.

All those aspects could be taken as elements for the preamble of the draft international agreement on illicit payments, which is yet to be drafted.

2. Scope and definitions

34. In attempting to define the scope of an international instrument, two approaches were considered: one to elaborate definitions of the various terms at the international level; the other to leave the major concepts to be determined in accordance with various national legislation. The draft international agreement combined the two approaches by indicating some general basic elements of definitions and including descriptions of the acts to be covered by the concepts. The three main groups of definitions relevant for the scope of the international agreement on illicit payments were: (a) acts covered; (b) actors involved and (c) sphere of application of the agreement.

(a) Acts covered

(i) Bribery

35. The term "bribery" is a well-known technical legal term in the penal laws of most countries. In addition to being criminally sanctioned in the penal codes, bribery is also often penalized in laws relating to elections, dealings with public officials, international commercial transactions, imports and exports, concessions and so on. The basic elements in the definition of bribery that appear in these laws are as follows: (a) one party gives, offers etc., (b) another party, who is a public official, (c) either directly or through an intermediary, (d) any reward, advantage or benefit of any kind, (e) in order to improperly influence the making or not making or implementation of a decision or act by the official concerned. However, the specific elements covered in the definitions and the scope of the concepts used in legal provisions on bribery vary from country to country.

36. The acts to be covered might include, on the one hand, the giving, offer, promise and attempt to give or offer, and, on the other hand, the demand, soliciting or acceptance of a bribe (extortion or passive bribery). It may involve some or all of the following: loans, gifts, favours and promises. In general, the nature of the payment is irrelevant as long as it consists of

"anything of value" to the recipient and the accompanying intention is to improperly influence his/her decisions or actions. In that context, it was noted that only payments of a certain size might be relevant.

37. The definition used in the draft international agreement to describe the acts covered by the instrument includes rather broadly "any payment, gift or other advantage", thus possibly covering such things as favours and promises (see annex I, art. 2 (c)).

(ii) Illicit payments

38. The term "illicit payments" is not as such a technical legal term. It is normally used in a non-technical sense to refer to any payments that are contrary to or prohibited by some law. In addition to bribery, there are three notable examples of illicit payments. These are: illegal political contributions; payments of royalties and taxes to illegal régimes in contravention of United Nations resolutions, and payments in violation of currency exchange regulations. An international agreement on illicit payments may or may not cover some of these types of payments.

a. Political contributions

39. In some countries, political contributions are not illegal per se; they become illegal when their size or manner of payment is bigger or other than legally stipulated. In the context of the present work, it was difficult to determine whether or when the illegal political contributions are intended to influence decision-making in international commercial transactions. In other words, there is no automatic direct connection between the making of such payments and international commercial transactions. When such a connection exists, the transaction can be dealt with under bribery.

40. Illegal political contributions have been condemned in some international instruments. For example, paragraph 8 of the OECD Guidelines states:

> "Enterprises should, unless permissible, not make contributions to candidates for public office or to political parties or other political organizations." 6/

41. The draft international agreement on illicit payments does not specifically mention illegal political contributions as a separate category of illicit acts. Therefore, unless they fall under the general description of bribes in article 1, it would appear that illegal political contributions per se are not covered under the agreement (see annex I, art. 1). The draft United Nations code of conduct on transnational corporations does not expressly mention illegal political contributions either, but this aspect would be implicitly covered under both the provisions dealing with non-interference in internal political affairs and in the section dedicated to corrupt practices (see E/1990/94, annex, paras. 16 and 20 (a) and (b)).

b. Payments in violation of exchange control regulations

42. Another example of payments that could be regarded as illicit are payments made in violation of the exchange control regulations of a State. Paragraph 2 (b) of article 8 of the International Monetary Fund agreement deals with contracts involving or requiring such payments as follows:

> "Exchange controls which involve the currency of any member and which are contrary to the exchange controls regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this agreement."

Payments in violation of exchange control regulations are not included under the definition of illicit acts contained in the draft international agreement.

(iii) Other corrupt practices

43. There is no generally accepted definition of "corrupt practices". Furthermore, it is not possible to have an exhaustive enumeration of activities that may be considered to be corrupt practices. Examples of activities that might be included in that concept are such improper activities in international commercial transactions as restrictive business practices, unfair competition, double accounting, fraudulent transfer pricing and tax evasion.

44. The activities that restrictive business practice legislation generally seeks to control include the fixing of volumes of production, for example, by means of quotas and the allocation of production areas on an exclusive or non-exclusive basis; the fixing of volumes or prices or sales, including discounts and rebates; the allocation of sales territory on an exclusive or non-exclusive basis, both domestic and foreign, and mergers, takeovers or partial acquisitions and common directorships. Those types of activities can also involve the use of other practices, such as boycott arrangements (refusal to supply or sell), tied purchasing arrangements with respect to materials, intermediate products and finished products, and tied selling arrangements.

45. The definition of restrictive practices in existing legislation tends to be in either general or specific terms. Where the definition is in general terms, there is often heavy reliance on the courts to determine and interpret the scope of the law. Some of these issues are dealt with in the context of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The draft code of conduct on transnational corporations would incorporate those rules through a cross-reference to the Set (see E/1990/94, annex, para. 35).

46. The draft international agreement on illicit payments does not cover any of the aspects mentioned under "other corrupt practices" (i.e., restrictive business practices, double accounting, fraudulent transfer pricing or tax evasion) (see annex I, art. 2 (b)).

(b) Actors involved

47. An important issue that arose in the consideration of the problem of illicit payments was the definition of the actors involved. Taking the broadest possible formula as the point of departure, such as "all legal and natural persons both public and private who engaged in any acts covered under the instrument", it was possible to define the actors that would be included or excluded in a definition.

(i) Transnational and other corporations

48. For the purpose of this work, a distinction between transnational and other corporations was not required. Similarly, it was not essential to define the term "transnational or other corporations", as the term was used on an inclusive rather than exclusive basis.

(ii) Intermediaries and other third parties

49. There is no generally accepted definition of an intermediary. In the context of bribery, illicit payments and other corrupt practices an intermediary may be regarded as the person or organization that serves as the vehicle of an improper payment. The term could cover all persons who, under whatever title, fulfil a role as middlemen, whether or not for a fee, between donor and recipient. Some intermediaries have been agents, fictitious sales corporations, foundations, trusts, lawyers and law firms, public relations firms and advertising agencies. Usually the function of the intermediary in a bribery or illicit payment transaction is either to channel the payment expressly or to receive so-called fees, which are then passed to the intended recipient. The draft agreement defines "intermediaries" in broad terms to cover "any enterprise or any other person" who "deals" with a public official "on behalf" of any other person "in connection with" an international commercial transaction (see annex I, art. 2 (c)).

(iii) Government and public officials

50. The recipients and donors of a bribe, or an illicit payment, can be a government or public official. The scope of these concepts appears to vary from one country to another. In some countries it covers only civil servants; in other countries it includes elected officials, the military, police and judicial personnel; in yet others it includes ecclesiastic and party officials. A broad definition of "government or public official" would encompass all persons in decision-making or implementing roles, as well as persons who are in a position to influence decision-making. A person who misrepresents him/herself as having decision-making or influencing capacities might also be covered by the instrument. A broad definition of a government or public official might also subsume the concept of "private official". The

definition of "public official" in the draft international agreement on illicit payments expressly covers persons holding legislative offices but does not include officials of intergovernmental organizations, nor does it specify whether the term would cover employees of State-owned or controlled enterprises (see annex I, art. 2 (a)).

(c) Sphere of application of the agreement

International commercial transactions

51. Once it was determined that the examination of the question of illicit payments was to be limited to "international" commercial transactions, as opposed to "national" commercial transactions, an important aspect to define was what international transactions would be covered under the agreement. A broad definition would refer to commercial transactions occurring across national boundaries between private persons, companies, Governments or governmental agencies. The scope of the instrument could, on the other hand, focus on some or all international transactions in which a company or individual (a) sells directly to a Government; (b) makes a sale requiring government approval; (c) makes an investment requiring government approval; (d) seeks any government license or permit relating to its business operation; (e) seeks national legislation favourable to its commercial interests; (f) seeks international action favourable to its interests.

52. The term "international commercial transaction" is defined in the draft international agreement in an inclusive manner to cover "any" sale, contract or "any other business transaction" with a Government or a governmental agency (including national, regional or local government). But the definition does not mention the seeking of national legislation or international action as part of the notion of international commercial transactions (see annex I, art. 2 (b)).

3. Action at the national level: measures by home, host and third countries

(a) Criminalization

53. Among the various possibilities considered, one way of dealing with corrupt practices at the international level was to criminalize them. Criminalization could be prescribed in an international instrument or in the various national laws. Thus, the instrument could either state the standards for the criminalization of illicit payments or urge their adoption into the various national penal statutes. The draft international agreement follows the second approach and, thus, contains an undertaking by the States parties to make the acts covered in the agreement (under art. 1) punishable by appropriate penalties under their national laws (see annex I, arts. 4 and 5).

54. It was noted that, apart from bribery, other kinds of illicit payments or corrupt practices have not traditionally been regulated in penal codes. Those kinds of payments are so variant in nature that it was not possible or desirable to evolve general criteria for penalizing them.

(b) Jurisdiction

55. It was further determined that the international agreement should also stipulate certain criteria as bases for allocating jurisdiction over the offence where two or more States are involved (the criteria for allocating jurisdiction developed under the draft international agreement have been described in the preceding section of this report). In addition, the issue was raised that, when as a result of applying those criteria two or more States have jurisdiction over a particular offence, it could be useful to establish consultation procedures between all the States having jurisdiction. Moreover, the instrument could stipulate a time-period within which a State having jurisdiction might take action if the other States having jurisdiction fail to take effective action. The instrument could also contain an express provision against the possibility of prosecution in more than one country for the same offence. The draft international agreement does not mention consultation procedures nor does it explicitly proscribe double prosecution (see annex I, art. 6).

(c) Disclosure

56. Another way of dealing with the question of illicit payments in an international instrument was to provide for standards of disclosure of information in relation to payments made in connection with international commercial transactions. The questions to be considered were: who should disclose, what, to whom, when and how. Disclosure is one of the main preventive measures prescribed in the draft international agreement on illicit payments (see annex I, art. 8).

(d) Civil remedies and actions

57. A further modality discussed was the inclusion of specific measures of redress to parties who have suffered actual injury as the consequence of the payment of a bribe or illicit payment or of a corrupt practice. These injured parties might be shareholders of the corporation that has committed the corrupt action and other corporations that might have suffered injury as a result of being placed at a competitive disadvantage. The instrument could expressly recognize a similar right on the part of consumers to bring civil action for injuries suffered from the sale of goods and services that are of inferior quality or for which higher purchase prices have been paid as a consequence of the corrupt act. The possibility of bringing civil action is contemplated in the international agreement, but there such a possibility is afforded only to an innocent party to the transaction. The relevant paragraph remains in brackets (see annex I, art. 8).

(e) Other measures

58. In addition, the following preventive measures were considered as deterrents for corrupt practices:

(a) The validity of the international commercial transaction. In many legal systems a contract that is proved to be tainted with corruption is regarded as contrary to public policy and hence unenforceable. The same is true of the Law of Treaties, i.e. article 50 of the Law of Treaties Convention, entitled "Corruption of a representative of a State". If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty. By analogy, this can be extended to governmental consent to a contract or concession, achieved by bribery, or any other type of corrupt practice. Any such provision would have to apply equally to both parties to the transaction. The possibility of declaring the relevant transaction null and void is also contemplated in the draft agreement (see annex I, art. 8);

(b) Home countries could impose relatively high tax surcharges on the profits made from transactions tainted with corrupt practices;

(c) Countries might be required to exclude for a certain number of years a foreign corporation engaged in corrupt practices from doing business in the country or with the Government;

(d) National legislation could require public officials to declare their net worth or net assets upon the assumption and at the end of office. This could be coupled with a requirement to account for any undue increases or anomalies that might appear.

None of these last three measures are included in the draft international agreement.

4. Action at the intergovernmental level

(a) Exchange of information

59. It was recognized that cooperation between home, host and third countries in the implementation of an international instrument on corrupt practices can have a significant impact on the prevention of those acts. Exchange of information may be effected on various levels, depending on the type of information and the nature of the parties involved. The following measures were considered in the preparation of the draft agreement.

(i) Reports

60. The instrument could require Governments to inform one another through the international body in charge of the international implementation mechanisms of measures taken to give effect to the instrument. The

information could be limited to legislative or administrative measures and proceedings developed pursuant to the instrument. Information on sanctions imposed on cases that are final could also be furnished, provided that sufficient guarantees were taken for the handling of such information. These actions were included in the draft international agreement (see annex I, art. 9).

(ii) Mutual assistance

61. In addition, States parties to an international instrument could be required to cooperate with other States parties in connection with the production of documents and the use of local procedures. To this end, it was considered that some international machinery for information exchange would need to be designated or established in the instrument. In this context, it was important to keep in mind that preliminary investigative material is frequently composed of allegations, circumstantial evidence and inconclusive documents. Premature disclosure of this sort of material could hamper further investigation of a case and might be damaging to innocent people; consequently, it was thought necessary to provide for the confidential treatment of the investigative material until there is consent on the part of the party supplying the information to make it public. The draft agreement thus provides for some institutional machinery, as well as guarantees for handling the relevant material (see annex I, art. 10).

(b) Extradition

62. Among the countries that have extradition treaties in force, it is essential that the offence for which extradition is requested is a crime in the requested and requesting countries. Also, national laws must not forbid extradition for the particular crime. Thus, the issue was raised that the applicability of existing extradition treaties to bribery, illicit payments and other corrupt practices cases would require the existence of an international agreement to that effect.

63. Existing extradition treaties exclude, as a general rule, political and related offences. Inasmuch as many cases of bribery and other corrupt practices may involve political figures and may have extensive political ramifications, it was considered that agreement should be reached on the extent to which the usual exclusion of political offence from extradition treaties shall be allowed to stand (see annex I, art. 11).

IV. CONCLUSION

64. There appears to be general recognition that the conclusion of an international agreement addressing the problem of corrupt practices in international commercial transactions could make an important contribution to the reliability, fairness and transparency of State/foreign private business relations for the benefit of economic development and growth in all parts of the world. In considering this question, it would help to keep in mind the initiatives already undertaken by the United Nations to address the problem of

corrupt practices, mainly through the work of the Ad Hoc Intergovernmental Working Group established to examine in detail the problem of corrupt practices, and later through the efforts of the Committee created to complete an international agreement on illicit payments. Both intergovernmental bodies considered carefully the various methods and issues involved in the elaboration of an international instrument on illicit payments and drafted the text of an international agreement. The examination of the draft agreement shows the considerable amount of work that has already been covered in this area, and the substantial degree of consensus already achieved on the text of the international agreement. Thus, further intergovernmental action on the question of corrupt practices could significantly benefit from the progress already made in the elaboration of the international agreement on illicit payments.

Notes

1/ Official Records of the Economic and Social Council, 1991, Supplement No. 10 (E/1991/31), chap. I.

2/ In particular, the report draws upon document E/AC.64/3, entitled "Corrupt practices, particularly illicit payments in international commercial transactions: concepts and issues related to the formulation of an international agreement", document E/AC.64/7, entitled "Major issues to be considered in the examination of the problem of corrupt practices, in particular bribery, in international commercial transactions by transnational and other corporations, their intermediaries and others involved" and document E/1979/104, entitled "Report of the Committee on an International Agreement on Illicit Payments on its first and second sessions".

3/ In 1975, the Security and Exchange Commission of the United States of America established a programme to encourage voluntary self-investigation, which led to more than 400 corporations admitting to questionable payments for transmission to government officials and politicians abroad (see Lloyd N. Cutler and Daniel M. Drory, "Toward an international code on illicit payments", in Emerging Standards of International Trade and Investment (Rowman & Allanheld, S.J. Rubin and G.C. Hufbauer, eds., (United States, 1983)).

4/ See E/1979/104, sect. IV, "Notes on the draft international agreement on illicit payments".

5/ See Organisation for Economic Cooperation and Development, International Investment and Multinational Enterprises: Declaration by the Governments of OECD Member Countries, 21 June 1976; Guidelines for Multinational Enterprises, General Policies, paragraphs 7 and 8.

6/ See Organisation for Economic Cooperation and Development, Guidelines ..., paragraph 8.

Annex I

DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS*

The draft international agreement on illicit payments, which the Committee decided to transmit to the Council at its second regular session of 1979 and to the Commission on Transnational Corporations at its fifth session, reads as follows:

"Article 1

"1. Each Contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law:

"(a) The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.

"(b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.

"2. Each Contracting State likewise undertakes to make the acts referred to in paragraph 1 (a) of this article punishable by appropriate criminal penalties under its national law when committed by a juridical person, or, in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate measures, according to its national law, with the objective of comparable deterrent effects.

"Article 2

"For the purpose of this Agreement:

"(a) 'Public official' means any person, whether appointed or elected, whether permanently or temporarily, who, at the national, regional or local level, holds a legislative, administrative, judicial or military office, or who, performing a public function, is an employee of a Government or of a public or governmental authority or agency or who otherwise performs a public function;

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* E/1979/104, sect. III; for the notes on the draft international agreement on illicit payments, see also sect. IV.

"(b) 'International commercial transaction' means, [inter alia] any sale, contract or any other business transaction, actual or proposed, with a national, regional or local government or any authority or agency referred to in paragraph (a) of this article or any business transaction involving an application for governmental approval of a sale, contract or any other business transaction, actual or proposed, relating to the supply or purchase of goods, services, capital or technology emanating from a State or States other than that in which those goods, services, capital or technology are to be delivered or rendered. It also means any application for or acquisition of proprietary interests or production rights from a Government by a foreign national or enterprise;

"(c) 'Intermediary' means any enterprise or any other person, whether juridical or natural, who negotiates with or otherwise deals with a public official on behalf of any other enterprise or any other person, whether juridical or natural, in connection with an international commercial transaction.

"Article 3

"Each Contracting State shall take all practicable measures for the purpose of preventing the offences mentioned in article 1.

"Article 4

"1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction:

"(a) Over the offences referred to in article 1 when they are committed in the territory of that State;

"(b) Over the offence referred to in article 1 (b) when it is committed by a public official of that State;

"(c) Over the offence referred to in article 1, paragraph 1 (a), relating to any payment, gift or other advantage in connection with [the negotiation, conclusion, retention, revision or termination of] an international commercial transaction when the offence is committed by a national of that State, provided that any element of that offence, or any act aiding or abetting that offence, is connected with the territory of that State.

"[(d) Over the offences referred to in article 1 when these have effects within the territory of that State.]

"2. This Agreement does not exclude any criminal jurisdiction exercised in accordance with the national law of a Contracting State.

"[3. Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction over any other offence that may come within the scope of this Agreement when such offence is committed in the territory of that State, by a public official of that State, by a national of that State or by a juridical person established in the territory of that State.]

"Article 5

"1. A Contracting State in whose territory the alleged offender is found, shall, if it has jurisdiction under article 4, paragraph 1, be obliged without exception whatsoever to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

"2. The obligation provided for in paragraph 1 of this article shall not only apply if the Contracting State extradites the alleged offender.

"Article 6

"Each Contracting State shall ensure that enterprises or other juridical persons established in its territory maintain, under penalty of law, accurate records of payments made by them to an intermediary, or received by them as an intermediary, in connection with an international commercial transaction. These records shall include the amount and date of any such payments and the name and address of the intermediary or intermediaries receiving such payments.

"Article 7

"1. Each Contracting State shall prohibit its nationals and enterprises of its nationality from making any royalty or tax payments to, or from knowingly transferring any assets or other financial resources in contravention of United Nations resolutions to facilitate trade with, or investment in a territory occupied by, an illegal minority regime in southern Africa.

"2. Each Contracting State shall require, by law or regulation, its nationals and enterprises of its nationality to report to the competent authority of that State any royalties or taxes paid to an illegal minority regime in southern Africa in contravention of United Nations resolutions.

"[3. Each Contracting State shall submit annually, to the Secretary-General of the United Nations, reports on the activities of transnational corporations of its nationality which collaborate directly or indirectly with illegal minority regimes in southern Africa in contravention of United Nations resolutions.]

"Article 8

["Each Contracting State recognizes that if any of the offences that come within the scope of this Agreement is decisive in procuring the consent of a party to an international commercial transaction as defined in article 2, paragraph (b), such international commercial transaction should be voidable and agrees to ensure that its national law provide that such party may at its option institute judicial proceedings in order to have the international commerical transaction declared null and void or to obtain damages or both.]

"Article 9

"1. Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.

"2. Each Contracting State shall furnish once every second year, in accordance with its national laws, to the Secretary-General of the United Nations, information concerning its implementation of this Agreement. Such information shall include legislative measures and administrative regulations as well as general information on judicial proceedings and other measures taken pursuant to such laws and regulations. Where final convictions have been obtained under laws within the scope of this Agreement, information shall also be furnished concerning the case, the decision and sanctions imposed in so far as they are not confidential under the national law of the State which provides the information.

"3. The Secretary-General shall circulate a summary of the information referred to in paragraph 2 of this article to the Contracting States.

"Article 10

"1. Contracting States shall afford one another the greatest possible measure of assistance in connection with criminal investigations and proceedings brought in respect of any of the offences [referred to in article 1/within the scope of this Agreement]. The law of the State requested shall apply in all cases.

"2. Contracting States shall also afford one another the greatest possible measure of assistance in connection with investigations and proceedings relating to the measures contemplated by article 1, paragraph 2, as far as permitted under their national laws.

"3. Mutual assistance shall include, as far as permitted under the law of the State requested and taking into account the need for preserving the confidential nature of documents and other information transmitted to appropriate law enforcement authorities [and subject to the essential national interests of the requested State]:

"(a) Production of documents or other information, taking of evidence and service of documents relevant to investigations or court proceedings;

"(b) Notice of the initiation and outcome of any public criminal proceedings concerning an offence referred to in article 1, to other Contracting States which may have jurisdiction over the same offence according to article 4;

"(c) Production of the records maintained pursuant to article 6.

"4. Contracting States shall upon mutual agreement enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of mutual assistance in accordance with this article.

"5. Any evidence or information obtained pursuant to the provisions of this article shall be used in the requesting State solely for the purposes for which it has been obtained, for the enforcement of this Agreement, and shall be kept confidential except to the extent that disclosure is required in proceedings for such enforcement. The approval of the requested State shall be obtained prior to any other use, including disclosure of such evidence or information.

"6. The provisions of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

"Article 11

"1. The offences [referred to in article 1/within the scope of this Agreement] shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the said offences as extraditable offences in every extradition treaty to be concluded between them.

"2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it [may at its option/shall] consider its Agreement as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

"3. Contracting States which do not make extradition conditional on the existence of a treaty [shall/may at their option] recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

"4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish the jurisdiction in accordance with article 4, paragraph 1."

Annex II

HISTORY OF UNITED NATIONS EFFORTS TO ADDRESS THE ISSUE OF CORRUPT PRACTICES IN INTERNATIONAL BUSINESS TRANSACTIONS

1. The question of corrupt practices in international business transactions was first addressed by the General Assembly in resolution 3514 (XXX) of 15 December 1975 entitled "Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved". The General Assembly condemned all corrupt practices, including bribery by transnational corporations, enlisted the cooperation of Governments of home and host countries and requested the Economic and Social Council to direct the Commission on Transnational Corporations to include in its programme of work the question of corrupt practices of transnational corporations and to make recommendations on ways and means whereby such corrupt practices could be effectively prevented.

2. The Commission on Transnational Corporations discussed General Assembly resolution 3514 (XXX) at its second session (1-12 March 1976) and decided that the United Nations Centre on Transnational Corporations should undertake studies on corrupt practices by transnational corporations with a view to assisting the Commission in making recommendations on ways and means whereby such corrupt practices could be effectively prevented.

3. On 5 August 1976, the Economic and Social Council, by resolution 2041 (LXI), established an ad hoc intergovernmental working group to conduct an examination of the problem of corrupt practices, in particular bribery, in international commercial transactions by transnational and other corporations, their intermediaries and others involved. The Group was to elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments, in whatever form, in connection with international commercial transactions as defined by the Working Group, and to report to the Economic and Social Council at its sixty-third session, including in its report such other relevant proposals and options as it might decide to submit. The report of the Ad Hoc Group was to be in a form that would enable the Council, if it so decided, to transmit its concrete recommendations to the General Assembly for final action. The Group was to be composed of 18 members selected by the Council on the basis of equitable geographical distribution. The Council requested United Nations agencies and bodies, specially the United Nations Commission on International Trade law and the United Nations Centre on Transnational Corporations, to render such assistance to the Ad Hoc Intergovernmental Working Group as it might request.

4. The Ad Hoc Intergovernmental Working Group held its first session from 15 to 19 November 1976. The first session was devoted to the organization of its substantive work and to a general exchange of views by delegations on the various aspects related to its mandate. At its second session, held from 31 January to 11 February 1977, the Ad Hoc Intergovernmental Working Group adopted a list of major issues to be considered in the examination of the problem of corrupt practices, as a basis for its future work. At its first three sessions, the Group's deliberations focused on the documents prepared at its request by the United Nations Centre

on Transnational Corporations (E/AC.64/3 and E/AC.64/7), which identified the issues involved in the analysis of the question of corrupt practices and indicated the options available to the Working Group.

5. The results of the first, second, third and reconvened third sessions of the Working Group were incorporated in a report (E/6006). Pursuant to the request of the Economic and Social Council, the report included a section containing provisions relevant to the elaboration of an international agreement to prevent and eliminate illicit payments in international commercial transactions. Also pursuant to the request of the Council, the Group included a second part in the report entitled "other pertinent proposals and solutions".

6. The Commission on Transnational Corporations, at its third session (25 April-6 May 1977), took note of the oral report made by the Rapporteur of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices and of the progress made by the Group.

7. The Ad Hoc Group reported to the Economic and Social Council at its second regular session of 1977, on the group's first, second, third and reconvened third sessions. The Group recommended that the Council "continue the work of the Working Group in order to complete its work, that it expand the membership of the Working Group and that it request the Working Group to draft an international agreement to prevent and eliminate illicit payments in whatever form, in connection with international commercial transactions, and consider other actions in combating corrupt practices". The Working Group further recommended to the Council to consider the question of convening an international conference of plenipotentiaries to conclude the international agreement.

8. The Economic and Social Council, in its resolution 2122 (LXIII) of 4 August 1977 entitled "Corrupt practices, particularly illicit payments, in international commercial transactions", noted the report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices (E/6006), reaffirmed the priority of the work on a code of conduct on transnational corporations and decided to continue the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices, and to expand its membership to include all interested States, provided that the Ad Hoc Group should meet only if a quorum of four States from each interested regional group was represented. It further decided that the Ad Hoc Working Group should draft an international agreement on illicit payments, considering all issues defined in its report. It called on the Group to report to it at its sixty-fifth session, and to the Commission on Transnational Corporations at its fourth session for its consideration and comments. The Council recommended that the General Assembly decide on the convening of a conference of plenipotentiaries in order to conclude an international agreement on illicit payments.

9. In its report on its fourth, fifth and resumed fifth sessions (E/1978/115), the Group, recognizing the need for the early adoption of an international agreement on illicit payments recommended to the Economic and Social Council that it re-examine the question of convening a conference of

plenipotentiaries open to all interested States to conclude an international agreement, with a view to setting an early date for the conference and establishing a committee, open to all interested States, to make preparations for the conference and to take such further action as may be deemed necessary. In accordance with the mandate given to it to draft an international agreement on illicit payments, the Working Group prepared ad referendum a draft text of an international agreement for consideration by the Economic and Social Council (E/1978/115).

10. The Commission on Transnational Corporations, at its fourth session (16-26 May 1978), took note of the report of the Ad Hoc Group on its fourth and fifth sessions (E/1978/39) and endorsed the work of the Group done so far.

11. The Economic and Social Council, in its resolution 1978/71 of 4 August 1978 entitled "Transnational corporations: the code of conduct and the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices", noted the progress made so far by the Intergovernmental Working Group and took note of the reports of the Group on its fourth, fifth and resumed fifth sessions (E/1978/39 and E/1978/115). It decided to establish a committee on an international agreement on illicit payments, open to all interested States, to meet for two sessions of two weeks each for the purpose of advancing as far as possible the work on an international agreement, particularly in respect of the articles not yet discussed, and to report to the Commission on Transnational Corporations at its fifth session and to the Council at its second regular session of 1979. It decided further, in principle, to convene, if possible and subject to a definitive decision by the Council at its second regular session of 1979, a conference of plenipotentiaries to conclude an international agreement.

12. The Committee on an International Agreement on Illicit Payments began its consideration of a draft text of an international agreement on illicit payments at its first session and had before it, as a basic document, the final report of the Ad Hoc Intergovernmental Working Group (E/1978/115). The Committee used square brackets in drafting the international agreement not only to indicate lack of agreement in the Committee but also to reflect problems arising from differences in national legal systems to which particular attention might have to be paid at the plenipotentiary conference. The conclusions reached by the Committee during its first session were contained in document E/AC.67/L.1, which included the texts approved at the first session, as well as notes concerning those texts. At its second session, the Committee continued its drafting of an international agreement on illicit payments on the basis of the conclusions reached at its first session. The Committee also had before it document E/AC.67/L.2, containing the draft final clauses of an international agreement on illicit payments prepared by the Secretariat. At its 12th meeting on 18 May 1979, the Committee decided to transmit the text of the draft international agreement on illicit payments to the Economic and Social Council at its second regular session of 1979 and to the Commission on Transnational Corporations at its fifth session, drawing attention to the notes attached to the text of the draft agreement (E/1979/104).

13. The Commission on Transnational Corporations, at its fifth session (14-25 May and 16-17 July 1979), expressed its disappointment that the report of the Committee on an International Agreement on Illicit Payments on its first and second sessions (E/1979/104) was not ready in time for consideration at the fifth session of the Commission.

14. The Economic and Social Council, in its decision 1979/73 of 3 August 1979, decided to transmit to the General Assembly at its thirty-fourth session two draft resolutions entitled "Transnational corporations: code of conduct on transnational corporations and international agreement on illicit payments" (E/1979/C.1/L.6) and "International agreement on illicit payments" (E/1979/C.1/L.10) for further consideration. It further decided that the Committee on an International Agreement on Illicit Payments should hold at least two other sessions in order to complete its work and should report to the Commission on Transnational Corporations at its sixth session and to the Council at its second regular session of 1980. The Council recommended that the General Assembly decide at its thirty-fourth session to convene in the last quarter of 1980 a United Nations negotiating conference to conclude the agreement on the basis of the work of the Intergovernmental Working Group on a Code of Conduct and of the work of the Committee on an International Agreement on Illicit Payments.

15. At its 55th meeting, on 5 December 1979, the Second Committee of the General Assembly considered these draft resolutions and agreed not to take any action on them.

16. The Economic and Social Council, at its second regular session of 1980, by its decision 1980/74 of 24 July 1980, decided to transmit to the General Assembly for further consideration at its thirty-fifth session a draft decision and a draft resolution. The draft decision, inter alia, stated that the United Nations conference for the adoption of an international agreement on illicit payments would be convened only after the completion of the work on the code of conduct on transnational corporations. In the draft resolution, the Council stated that it decided to convene a conference of plenipotentiaries to conclude an international agreement on illicit payments to meet not later than 30 June 1981, and it invited all States to participate.

17. The Commission on Transnational Corporations, at its sixth session (1980), heard a report by the Executive Director of the United Nations Centre on Transnational Corporations on the status of the work related to the elaboration of an international agreement on illicit payments.

18. In decision 35/425 of 5 December 1980, the General Assembly took note of the report of the Second Committee in which it agreed that no decision would be taken on the draft decision and draft resolution annexed to Economic and Social Council decision 1980/174 of 24 July 1980, regarding United Nations conferences to conclude a code of conduct on transnational corporations and an international agreement on illicit payments (A/35/545/Add.1).